

March 18, 2005

REPLY COMMENTS – Via Electronic Filing

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Level 3 Reply Comments, *Assessment and Collection of Regulatory Fees for Fiscal Year 2005*, MD Docket No. 05-59

Dear Ms. Dortch:

Level 3 Communications, LLC (“Level 3”) urges the Commission to reform the regulatory fee regime for international services, as the Commission proposed in its regulatory fee Notice of Proposed Rulemaking for fiscal year 2005 (“NPRM”).<sup>1</sup> In particular, Level 3 supports the Tyco proposal, under which the Commission would establish a separate fee category for private submarine cable operators, (2) apportion the international services revenue requirement between this new fee category and the remaining international bearer circuit (“IBC”) fee category based on the number of employees or employee-hours the Commission devotes to regulating them, and (3) adopt a flat, per-cable-landing license fee for the new private submarine cable operator category.<sup>2</sup> This approach would eliminate current market distortions, simplify administrative obligations for the Commission and for fee payors, and, most importantly, apportion fees fairly among providers of international services as the Communications Act requires.

**Level 3’s Submarine Cable Operations**

Level 3 owns the Yellow System, a submarine cable system connecting landing stations in Brookhaven, New York, and Bude, England, and it operates the system on a

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<sup>1</sup> See *Assessment and Collection of Regulatory Fees for Fiscal Year 2005*, Notice of Proposed Rulemaking, MD Docket No. 05-59 ¶¶ 11-17 (rel. Feb. 15, 2005) (“*Regulatory Fee NPRM*”).

<sup>2</sup> See *id.* ¶ 11; see also Comments of Tyco Telecommunications (US) Inc., MD Docket No. 05-59 at 7-8, 23-25 (filed March 8, 2005) (“Tyco Comments”).

non-common carrier basis. Level 3 pays substantial IBC fees annually for active capacity on the Yellow System and for its leases of capacity on other systems.

### **The Commission Should Adopt Tyco's Proposal in Place of the Current Regime**

The Commission should adopt Tyco's proposal in place of the current IBC fee regime. The Commission should jettison the current regime—which requires IBC operators to pay fees based on their active capacity connecting U.S. and foreign points—for the simple reason that active capacity bears no relationship to the regulatory costs that operators generate. As Tyco explained in its comments, the current regime would require a private submarine cable operator to double its fee payment if it doubled the capacity on an existing cable, even though increasing the capacity would not require regulatory approval or notification and would not create additional regulatory costs for the Commission.<sup>3</sup> For this reason, the current capacity-based system contravenes Section 9 of the Communications Act, which requires the Commission to levy fees “to recover the costs of [its] regulatory activities.”<sup>4</sup>

In addition to its failure to link an operator's fee obligations to the regulatory costs the operator creates, the current fee regime distorts the market for international capacity and forces private submarine cable operators like Level 3 to shoulder a disproportionate share of the total regulatory fee burden. The current regime distorts the market because it discourages operators from installing more efficient systems or increasing capacity on existing systems. As noted above, any increase in capacity generates greater regulatory fees even though a capacity increase does not alter the Commission's regulatory oversight.

The capacity-based regime also requires private submarine cable operators to subsidize common-carrier submarine cable operators. Private operators require less regulatory oversight than common-carrier operators. Collecting fees from them at the same rate unfairly requires the private operators to bear a large part of the common-carrier operators' burden.

The current IBC fee regime also imposes significant administrative costs, both on private submarine cable operators and on the Commission itself. Under the current regime, a private submarine operator must make judgment calls about whether certain circuits are active, determine whether the operator or its customers are liable for payment obligations on active circuits, and keep records relating to all of these matters—all for the sole purpose of calculating regulatory fee obligations. Likewise, the current regime requires the Commission to rely on incomplete industry reporting when estimating total active capacity, issue clarifying notices (as it did last year) in an effort to explain more clearly who must pay the capacity-based fees, and review and tabulate operators' payments to ensure that they correspond to the Commission's incomplete understanding of the operators' capacity. Needless to say, these administrative obligations result in substantial (and unnecessary) costs.

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<sup>3</sup> See Tyco Comments at 14-15.

<sup>4</sup> 47 U.S.C. § 159(a)(1).

Tyco's proposal would address all of these shortcomings. In keeping with the requirements of Section 9, Tyco's proposal would align operators' fee obligations with the Commission's regulatory costs by separating private submarine cable operators from the rest of the IBC fee category.<sup>5</sup> For the same reason, Tyco's proposal would eliminate private submarine cable operators' effective subsidy of common-carrier operators. Tyco's plan would also end existing market distortions by removing the disincentive to expand capacity. Indeed, the Commission has noted that Tyco's alternative "could provide an incentive for carriers to initiate new services and to use new facilities more efficiently."<sup>6</sup> Finally, as the Commission has recognized, using Tyco's license-based regime instead of a capacity-based regime "would be administratively simpler for both the Commission and carriers."<sup>7</sup>

### **Section 9 of the Communications Act Requires the Commission to Reform the IBC Fee Category**

The Commission must reform the current IBC fee category pursuant to Section 9 of the Communications Act. As the Commission explained in the NPRM, "Section 9(b)(3) *requires* the Commission to amend the [fee] schedule" if the fees assessed no longer derive from a determination of the full-time equivalent number of FCC employees performing the regulatory activities at issue.<sup>8</sup> As Tyco and others have explained, the current system fails to satisfy this statutory requirement because it imposes a regulatory fee burden on private submarine cable operators that bears no relationship to the regulatory costs they generate.<sup>9</sup>

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<sup>5</sup> The Satellite Industry Association ("SIA") filed comments supporting reform of the IBC fee category, but it proposed an alternative approach that would fail to address the current disconnect between an operator's fee obligations and the regulatory cost it imposes on the Commission. More specifically, SIA urged the Commission to create a new category for satellite operators and leave all submarine cable operators (private and common-carrier) together in a single fee category. *See* Comments of the Satellite Industry Association, MD Docket No. 05-59 at 5-10 (filed March 8, 2005). Since common-carrier operators generate greater regulatory costs than non-common carrier operators, SIA's alternative proposal would not satisfy the requirements of Section 9 because it would subject common-carrier operators and non-common carrier operators to the same fee obligations. For the same reason, SIA's approach would not address the effective subsidy that non-common carrier operators currently pay to common-carrier operators.

<sup>6</sup> *Regulatory Fee NPRM* ¶ 15.

<sup>7</sup> *Id.*

<sup>8</sup> *Regulatory Fee NPRM* ¶ 16 (construing Section 9(b)(3)) (emphasis added).

<sup>9</sup> *See, e.g.,* Tyco Comments at 9-11; *Regulatory Fee NPRM* ¶ 13 (summarizing other industry comments).

Section 9 of the Communications Act empowers the Commission to make these necessary changes because the Commission's regulation of international service providers has changed "as a consequence of Commission rulemaking proceedings or changes in law."<sup>10</sup> As Tyco explained in its comments and in its separate legal analysis of Section 9, several changes in law and the Commission's rules compel an amendment to the regulatory fee schedule, including: the United States' GATS commitments in basic telecommunications, the Commission's implementation of those commitments in the *Foreign Participation Order*, the Telecommunications Act of 1996, the Commission's related rulemaking proceedings streamlining international Section 214 authorization processes, and the Commission's submarine cable streamlining proceeding.

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For these reasons, Level 3 urges the Commission to reform the fee regime for international service providers in the manner that Tyco has proposed. Failing to reform the system (or reforming it incompletely, as SIA proposes) would violate the requirements of Section 9, preserve unnecessary market distortions and administrative burdens, and force private submarine cable to continue paying outsized regulatory fees that bear no relationship to the regulatory costs they generate.

Respectfully submitted,

A handwritten signature in black ink that reads "William P. Hunt III" followed by a stylized monogram "Jm".

William P. Hunt III

Vice President, Public Policy

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<sup>10</sup> 47 U.S.C. § 159(b)(3).